SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 485

THE LONDON and OVERSEAS INSURANCE CO., *et al.*,

Petitioners,

v.

BUNGE CORPORATION, and BROOKS BANKER, as Treasurer of American Express Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on May 6, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (R. 377) is unreported and is printed in the Appendix at pp. 8a-21a. The opinion of the Court of Appeals for the Second Circuit (R. 474), printed in the Appendix at pp. 1a-5a, is reported at 394 F. 2d 496.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 6, 1968 (R. 479) and a copy thereof is appended to this petition in the Appendix at pp. 6a-7a. A timely petition for rehearing or, in the alternative, rehearing in banc filed on May 21, 1968 (R. 481) was denied on June 10, 1968 (R. 532, 534). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

I.

Whether in an action involving commercial misconduct or fraud on the part of the third-party defendant impleaded under Rule 14(a) of the Federal Rules of Civil Procedure, the plaintiff's unilateral release of the third-party defendant extinguishes the third-party action and plaintiff's cause of action against the defendant?

II.

Whether in third-party practice under Rule 14(a) of the Federal Rules of Civil Procedure a defendant insurer's accelerated right of subrogation against a third-party defendant survives plaintiff's release of the third-party defendant?

STATUTE INVOLVED

The statutory provision involved is Rule 14(a) of the Federal Rules of Civil Procedure.

Rule 14.

Third-Party Practice

(a) *When Defendant may Bring in Third Party.* At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a

summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in

which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

STATEMENT

This action was initiated by Bunge Corporation ("Bunge") in a complaint filed on November 12, 1964 against the London and Overseas Insurance Co., et al. ("Insurers") (1a).[1] The jurisdiction of the District Court was invoked under 28 U. S. C. § 1332(a)(2), the matter in controversy exceeding the sum of $10,000 and being between a citizen of a State and subjects of a foreign state.

The claim of Bunge for $20,244,252.81 (26a) arose out of alleged losses sustained by Bunge by reason of a series of loans made to the notorious "Tino" DeAngelis, who, while president of Allied Crude Vegetable Oil Refining Corporation ("Allied") of Bayonne, New Jersey, became the central figure in what is known as "The Great Salad Oil Swindle" [See Norman C. Miller, "The Great Salad Oil Swindle" (Coward McCann, 1965)], or to Allied, his alter ego. As "collateral" for these loans, Bunge received warehouse receipts issued by American Express Warehousing, Ltd. ("Limited") purporting to represent over 160,000,000 pounds of soybean oil in the custody of Limited (24a, 142a). Limited was a wholly-owned and controlled subsidiary of American Express Company ("American Express"). Bunge is a domestic corporation engaged in international trade, with affiliates in Latin America and Europe. Its principal business is the buying and selling of agricultural commodities in domestic and foreign commerce (4a). In

[1] All references are to pages of the appendix in the court below unless otherwise indicated.

All emphasis is supplied throughout unless otherwise indicated.

the ordinary course of business Bunge, through its London office or affiliate, arranged with Insurers in London for All Risk Marine Insurance covering commodities owned by Bunge in course of such business while awaiting shipment or in course of transit between various locations throughout the world (6a-7a, 176a-177a).

On or about November 19, 1963, Allied filed a petition for bankruptcy and it later became evident that there was little or no soybean oil in storage at Bayonne for account of Allied, DeAngelis, Bunge or any of the numerous other holders of receipts issued by Limited. On November 12, 1964, Bunge filed suit against its Insurers (1a, 4a-27a). On December 8, 1964, Insurers filed their answer (2a, 40a-46a) asserting substantial grounds for denying liability to Bunge and on December 16, 1964, Insurers filed a third-party complaint pursuant to Rule 14(a) against American Express, claiming that if plaintiff had sustained the losses alleged in the complaint, such losses arose from the wrongful acts of third-party defendant American Express or of its instrumentality Limited and that "if plaintiff recovers against defendants, the third-party defendant will be liable over to defendants who will have been subrogated to the plaintiff's rights against the third-party defendant" (2a, 47a-49a). A motion by American Express to dismiss the third-party complaint was denied on May 6, 1965 (54a-57a).

A joint motion by Bunge and American Express filed on May 20, 1965 (58a) to stay the taking of any action in the litigation pending the outcome of settlement negotiations between them, opposed by defendant Insurers (71a-73a), was granted by the District Court; all action in the case was stayed until October 1, 1965 (76a). On that date Bunge and American Express again joined in a motion to stay each of the parties from taking any steps in the third-party action (77a-78a). Insurers opposed this motion as well, on

the ground that the relief which the moving parties sought was in effect a permanent injunction against Insurers which would nullify the ruling of the District Court, dated June 6, 1965, denying the application of American Express to dismiss the complaint (86a-88a), but on October 6, 1965 a stay of proceedings in the third-party action was granted until further order of the Court (89a-94a). As a practical matter, this effectively stayed all proceedings.

A settlement agreement between Bunge and American Express was consummated on June 14, 1967 (101a). Bunge and American Express joined in a motion returnable September 12, 1967 for summary judgment dismissing the third-party complaint on the ground that the subrogation claims asserted therein had been extinguished by Bunge's release of American Express pursuant to the settlement agreement (95a-96a, 97a-107a, 110a-111a). The basis of the motion is set forth in the supporting affidavit of counsel to Bunge:

> The insurers assert against Amexco only alleged potential rights they may at some future time derive from Bunge by subrogation. The insurers' rights can rise no higher than Bunge's. (103a)
>
> * * *
>
> It was the intent and act of Bunge in releasing Amexco to completely and unequivocally release Amexco from, and destroy and extinguish, all claims and rights of action covered by the release, including all claims and rights of action asserted against Amexco in the above captioned action, which Bunge might have against Amexco or which anyone else deriving or claiming to derive through Bunge might have against Amexco, including any claim or right of action which Bunge's insurers, the defendants and third-party plaintiffs herein, might have or ac-

> quire against Amexco by way of subrogation to the rights of Bunge. (102a)

In opposition to the motion to dismiss the third-party complaint Insurers urged that subrogation rights, accrued or inchoate, being founded on equitable principles, cannot be destroyed in the manner asserted by Bunge and American Express, namely, that plaintiff and third-party defendant to a three party litigation may stay and prevent prompt judicial determination of the controversy while they, without consultation with, or consent of, Insurers, settle the case between themselves and in so doing release the tortfeasor, the third-party defendant, from any liability to defendant Insurers. Were this submission accepted by the Court, Insurers argued, they, the Insurers, would be deprived of their rights to full indemnity from the tortfeasor in circumstances where Insurer's denial of liability was reasonable and not arbitrary or unjustified. Moreover, if the Court should decide to dismiss the third-party complaint, Insurers' argument concluded, the complaint in the main action should also be dismissed because Bunge impaired and interfered with the enforcement of the defendant Insurers' rights as subrogees (186a).

The District Court, in a detailed opinion, ruled:

> Bunge, having released the wrongdoer in toto, extinguished the res to which subrogation could have attached and there was no claim left against either the wrongdoer or the insurer. This was done intentionally and with full knowledge of the consequences. (211a)

The complaint and third-party complaint were dismissed by the District Court (200a-214a).

The Court below reversed the District Court as to dismissal of Bunge's action against Insurers, but affirmed the order as to the dismissal of the third-party complaint.

The damages originally sought by Bunge in its complaint against Insurers were over $20,000,000.00. Bunge has since stated that its claim against Insurers must be reduced by crediting Insurers with the amount recovered by Bunge under the settlement with American Express (186a). This credit is between $9,000,000.00 and $12,500,000.00, depending upon the result of certain litigation presently being carried on by American Express.

REASONS FOR GRANTING THE WRIT

The decision of the Court below construing Rule 14(a), based upon the premise that an insurer who has not yet paid its insured's claim has no right in claims which the insured has against third parties, is directly in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Glens Falls Indemnity Co.* v. *Atlantic Building Corp.*, 199 F. 2d 60 (1952), and, with the decision of another panel of the Court of Appeals for the Second Circuit in *St. Paul Fire & Marine Ins. Co.* v. *United States Lines Co.*, 258 F. 2d 374 (1958), *certiorari denied*, 359 U. S. 910 (1959).

The decision of the Court below nullifies Rule 14(a) of the Rules of Civil Procedure for the United States District Courts:

> RULE 14. THIRD-PARTY PRACTICE (a) WHEN DEFENDANT MAY BRING IN THIRD PARTY. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him . . .

The word "claim" as used in this rule is construed in *Moore's Federal Practice* at ¶ 14.07, page 509: ". . . the purpose of the draftsmen of the Rules was to get away from narrow concepts of 'cause of action' and to substitute the idea of the claim as a 'group or aggregate of operative facts giving ground or occasion for judicial action.' This concept is important under Rule 14 . . . Fortunately the federal courts have not hesitated to give the Rule a liberal interpretation.", citing Clark, *The Cause of Action,* 85 U. Pa. L. Rev. 354 (1934) and *American Fidelity & Casualty Co.* v. *Greyhound Corp.,* 232 F. 2d 89 (5th Cir. 1956). See also, *Original Ballet Russe* v. *Ballet Theatre,* 133 F. 2d 187 (2nd Cir. 1943); *U. S.* v. *Memphis Cotton Oil Co.,* 288 U. S. 62 (1932).

The effect of impleader of a person ". . . who is or may be liable . . ." to a defendant is considered in *Moore's Federal Practice* at ¶ 14.08, pages 531-534: "As in all third-party practices, the accrual of a right is sometimes accelerated under Rule 14 . . . A further example of acceleration of liability is found in subrogation cases. Thus, an insurer, sued on the policy may implead those against whom the insurer acquires the plaintiff's rights after payment of judgment . . ." [citing *St. Paul Fire & Marine Ins. Co.* v. *United States Lines Co., supra; Glens Falls Indemnity Co.* v. *Atlantic Building Corp., supra, and Mid-States Ins. Co.* v. *American Fidelity & Casualty Co.,* 234 F. 2d 721 (9th Cir. 1956)] ". . . the impleaded third party's substantive rights are unaffected since the defendant cannot normally enforce his judgment against the third party until the judgment in the original proceeding has been paid or satisfied."

Language that it is not liability to pay, but an actual payment to the creditor which confers the right to subrogation, or words to that effect, is contained in opinions written before the advent of modern third-party practice or in

opinions that did not involve third-party practice. *American Surety Co.* v. *Palmer,* 240 N. Y. 63 (1925), cited by the Court below, was decided three years after the introduction of impleader in New York and did not involve third-party practice. The question there was whether the insurer's right of subrogation could be accrued in advance of payment to the insured in order to establish for the insurer the status of a holder in due course of a negotiable instrument. The Court decided that it could not, but in impleader the right of subrogation is accrued prior to payment being made by the insurer.

Glens Falls Ins. v. *Wood,* 8 N. Y. 2d 409 (1960) is similarly inapposite. There the plaintiff insurer, having paid a judgment of $500.00 against the insured owner of a car, sought to have the active tort-feasor, the driver of the car, bound by the finding in the first action that the driver was negligent. The driver was not impleaded in the first action because the insurer was not a named defendant. The Court found that neither the cooperation nor the subrogation clause in the policy conferred the status and rights of a named defendant upon the insurer as to parties outside of the first action who might possibly be liable over to the insured. The insurer's attempt to avoid the effect of this rule by an unwarranted extension of the vouching in doctrine was rejected by the court. Here the insurer was a named defendant.

Similarly, *Meredith* v. *The Ionian Trader,* 279 F. 2d 471 (2nd Cir. 1960) is distinguishable from the instant case. There the plaintiff asserted that prior to payment of a claim the insurers had a right as potential subrogees of that claim to bring an action against the tort-feasor on their behalf. The Court refused to accept this argument, pointing out that *St. Paul Fire & Marine Ins. Co.* v. *United States Lines Co., supra,* did not hold to the contrary but

permitted accelerated accrual only in the context of Rule 14(a). The instant case, of course, involves the accelerated accrual effect of Rule 14(a).

Further, the authorities cited by the Court below for the proposition that after the denial of liability by an insurer, the insured may enter into a settlement with a third party without prejudicing its rights against the insurer, are inapposite. The issue is whether, when all parties are before the Court for a judicial determination of their controversy and the subrogation rights of the third-party plaintiff insurer have accrued pursuant to the current judicial interpretation of Rule 14(a), the insured and the tort-feasor may bilaterally destroy the matured rights of the insurer. None of the New York cases cited by the Court below deal with third-party practice.

The Court of Appeals for the Fourth Circuit in *Glens Falls Indemnity Co.* v. *Atlantic Building Corp., supra,* in ruling on the question of whether the inchoate right of subrogation was a proper basis of impleader, stated:

> It is true in South Carolina and elsewhere that the right of subrogation may not be recognized unless the party asserting it has paid the debt on which the right of subrogation is based. . . . *But this rule applies when the indemnitor brings a separate suit against the person whose action has caused the loss.* Rule 14 was designed to prevent this circuity of action and to enable the rights of an indemnitee against an indemnitor and the rights of the latter against a wrongdoer to be finally settled in one and the same suit. (at p. 63)

In *St. Paul Fire & Marine Ins. Co.* v. *United States Lines Co., supra,* the third-party defendant United States Lines Co. ("USL") argued that until the insurer had paid

the loss or at the very least suffered judgment on the original complaint, it had not been damaged and therefore possessed no right of subrogation. USL asserted that a contrary decision would convert Rule 14(a), a procedural remedy, into an instrument for abridging substantive rights. The Court found the argument of USL "unconvincing", holding that viewed from USL's standpoint of safeguarding its substantive rights it could make no difference whether the plaintiff insured or the defendant insurer filed the claim against it.

Krause v. *Amer. Guar. & Liab. Ins. Co.* and *Seligson* v. *The Fidelity and Casualty Company*, 22 N. Y. 2d 147 (1968), two other actions having their origins in the "salad oil swindle", were decided by the New York Court of Appeals in the interval between submission of the case to the Court below and the filing of the petition for rehearing. The opinion construed impleader under New York practice, interpreting the same language as in subdivision (a) of Rule 14 of the Federal Rules of Civil Procedure[2], and held that the rights of the insurer cannot be circumvented by plaintiff and third-party defendant. The language used by the Court clearly showed that the New York Courts would reach a result contrary to that in the instant case. In discussing impleader the Court stated:

> . . . the insurer may be put in the position, on the one hand, of having to pay the insured substantial

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[2]In Weinstein, Korn and Miller, 2 *New York Civil Practice* (1968), it is noted at ¶ 1007.12 that "Federal third-party practice under Rule 14 of the Federal Rules of Civil Procedure is substantially the same as New York practice." The New York Statute is set forth in McKinney's Consolidated Laws of New York, Civil Practice Law and Rules, Vol. 7B at p. 333:

> § 1007. When third-party practice allowed. After the service of his answer, a defendant may proceed against a person not a party who is or may be liable to him for all or part of the plaintiff's claim against him. . . .

sums of money on questionable claims in order to preserve its subrogation rights, or, on the other hand, it may have to forego the opportunity to prepare what might well have proved to be an excellent case against the alleged tort-feasor. This should not be. Procedural rules exist to further the ends of justice, not to force parties to forego substantive rights and not to give parties advantages which the true merits of their claims or defenses do not warrant. Consequently, absent an unambiguous covenant by the insurer not to sue the alleged tort-feasor prior to payment of the insured's claim, *elemental fairness and the underlying policies of the Civil Practice Law and Rules demand that the insurer should not be required to make an election between its defense to the main action and its subrogation rights.* (At pp. 155-156)

In *Krause, supra,* the New York Court distinguished and affirmed the denial of impleader in automobile collision cases that involve public and social policies quite different from commercial claims of millions of dollars. The New York Court of Appeals noted that automobile collision cases involve minor claims, and that the very purpose of collision insurance is to permit the insured to collect his damages promptly and use the funds to repair his car and declared: "Simple prudence would require that the insurer carefully examine the validity of a two million dollar claim and litigate any issue it can in good faith raise", at p. 154.

The Court below said:

"To require that the insured first fully litigate its dispute with the insurer before pursuing the third party would be manifestly unfair." (394 F. 2d at 497)

This is in direct conflict with the New York Court of Appeals' ruling that ". . . elemental fairness . . . demand[s] that the insurer should not be required to elect between its defense to the main action and subrogation rights." Moreover, the Court below erred in assuming that Bunge would be required to ". . . first fully litigate its dispute with the insurer before pursuing the third party. . . .". The entire controversy was before the trial court and prompt resolution of all issues between insured, Insurers and the tort-feasor was available.

Social policy may dictate that the rule announced by the Court below be applicable to impecunious individuals in the interests of prompt justice, but it is certainly not applicable to one of the largest commodity businesses in the world in a claim for about $20,000,000. In large commercial cases there are business factors which consciously or unconsciously may influence an insured to compromise the claim against the tort-feasor that would not influence the insurer with the result that the tort-feasor will thereby avoid full responsibility for its wrong. This is especially true, when, as the Court below found, the insured may retain its claim against the insurer for the difference between its loss and what the tort-feasor paid it. The arrangement between Bunge and American Express contemplated Bunge's retention of its net claim against Insurers. The potential prejudice to the insurer is apparent. The insured would not be directly prejudiced by the delay in payment because interest on the amount of the claim would accrue until the date of payment by the insurer. Moreover, in the instant case, Bunge joined with American Express in bringing about the stays of the action for more than two years thereby thwarting the prompt administration of justice for all parties. In the ordinary course of the commercial jury calendar in the District Court, the entire controversy would have been tried and

adjudicated before the arrangement between Bunge and American Express was reached on June 14, 1967. It is implicit in the ruling of the Court below that Insurers are not entitled to the same rights under Rule 14(a) as are other litigants in a similar position.

The intent of Rule 14(a), justice and equity dictate one of two results here. First, as held by the District Court, the settlement between the insured Bunge, and the third-party defendant tort-feasor, American Express should extinguish the insured's right of action against the Insurers because of the willful destruction by Bunge of the Insurer's right of subrogation. Or, second, the Insurers should retain their right of subrogation since the general release was taken by the tort-feasor from the insured with full knowledge of the insurers' subrogation rights. The decision of the Court below would compel the insurer to elect between waiving its right to subrogation and denying a claim on valid, substantial and justifiable grounds or gratuitously paying twenty million dollars to protect the claim over against the tort-feasor and then meeting the defense that subrogation rights do not arise out of a voluntary payment. *Aetna Life Ins. Co.* v. *Middleport,* 124 U. S. 534 (1887); *Bonnie* v. *Maryland Cas. Co.,* 280 Ky. 568 (1939); *Hartford Fire Ins. Co.* v. *Payne,* 28 Ga. App. 655 (1922).

The decision of the Court below is also in conflict with the substantive law of New York as declared by decisions of the highest Court of the state. The New York Court of Appeals said in *Krause, supra,* that impleader would in no way delay settlement between the insured and the tort-feasor, these parties being free to settle as between themselves at any time. Such a settlement extinguishes the rights of the insured against the insurer in commercial property-loss claims. In *Jones* v. *Bacon,* 145 N. Y. 446 (1895), cited by the New York Court of Appeals in the *Krause* opinion, defendant's testator promised plaintiff that he would indemnify plaintiff

if plaintiff would become an indorser on the note of one Kingsbury. Kingsbury later became insolvent and defaulted, plaintiff being forced to make payment on the note to Kingsbury's creditor. Subsequently, plaintiff released Kingsbury from his liability to pay, apparently in an effort to persuade Kingsbury to testify to the agreement. This was necessary because plaintiff was not a competent witness due to the intervening death of Kingsbury's creditor and defendant's testator. The Court found that the extinguishment of defendant's right of subrogation against Kingsbury, prior to any payment by defendant, discharged the estate of the indemnitor from liability to plaintiff. This decision supports the first alternative.

Jones v. *Bacon, supra,* must be distinguished from such cases as *Cardinal* v. *State,* 304 N. Y. 400, *motion to amend remittitur denied,* 304 N. Y. 875 (1952), *certiorari denied as not timely applied for,* 345 U. S. 918 (1953); *Matter of Empire State Surety Co.,* 214 N. Y. 553 (1915); and *Vanguard Ins. Co.* v. *Polchlopek,* 18 N. Y. 2d 376 (1966). *Cardinal* and *Empire State Surety* are cases involving liability policies where the insurer failed to defend the insured in a personal injury action, thereby breaching the policy. The Court held in both cases that the insurer, by abandoning the insured to its own devices, had impliedly consented to the insured's settlement of the injury claim. Simple justice required that the insurer could not complain of the insured's settling with the injured plaintiff in these circumstances. *Vanguard, supra,* was an automobile accident case in which New York public policy and statutory law relating to uninsured motorist coverage played an important, if not decisive, part and for that reason cannot be expanded into a statement of general principle.

The New York Court of Appeals, in deciding *Connecticut Fire Ins. Co.* v. *Erie Ry.,* 73 N. Y. 399 (1878), also cited in *Krause, supra,* employed the second alternative mentioned

above. In that case a general release given by an insured to a tort-feasor was modified by what in substance was an application of the equitable doctrine of reformation of an instrument. The Court held that the insurer who had sued the tort-feasor was not a volunteer by reason of having consented to a judgment in a prior action on the policy, even though a general release to the tort-feasor would have been a bar to the action on the policy, as the release given, although general in form, was to be construed as only a partial release to the extent of the insured's recovery under the settlement.

This approach was used in a case recently decided in New York by the Appellate Division, Second Department, *Silinsky* v. *State-Wide Insurance Company,* 30 A. D. 2d 1 (1968). There the plaintiff insured brought an action against the insurer on medical payment coverage in an automobile liability policy, but, prior to the bringing of the action, plaintiff had settled with the alleged tort-feasors for a substantial sum and had executed a general release on their behalf. Defendant insurers, who had made no payment under the policy, asserted that plaintiff's claim was barred by virtue of the general release given to the tort-feasors, apparently relying on the reasoning of *Jones* v. *Bacon, supra.* However, the Court came to the conclusion that the plaintiff could not be estopped from maintaining the action as nothing was done to prejudice defendant's rights in that a release given to a tort-feasor who has knowelge of the insurer's rights will not preclude the insurer from enforcing its right of subrogation against the wrongdoer. It would appear the Appellate Division, after weighing the equities, determined that while the insurer's right of subrogation did not accrue for purposes of actually securing redress from the tort-feasor until payment under the policy was made to the insured, the insured and the tort-feasor would not be permitted to destroy the inchoate right prior to such payment.

The rationale and ruling of the Court below is manifestly unfair and in derogation of the underlying principles and policies of enlightened rules of civil procedure as exemplified by Rule 14(a). By depriving defendants who are not necessarily but "may be" held liable to the plaintiff of their cause of action for full indemnity, the natural right of justice, from the wrongdoer, third-party defendant, and at the same time permitting plaintiff to proceed with its cause of action, the Court below is in effect saying to defendants: "Regardless of the merits of your defenses to plaintiff's allegations against you, if you wish to proceed against a third-party wrongdoer you must pay the plaintiff's claim. You are not entitled to have the issues of your liability *vel non,* and of the third-party defendant's liability, litigated in one civil action under Rule 14(a) if the plaintiff for motives of its own chooses to accept a compromise payment from the wrongdoer. The plaintiff may elect to release the wrongdoer and deprive you of your claim against the wrongdoer, but this does not release the plaintiff's claim against you." This, simply stated, is the ruling of the Court below. We submit it is completely contrary to manifest equitable policies and practical purposes of this Honorable Court in promulgating Rule 14(a).

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 354—September Term, 1967.

(Argued March 19, 1968 Decided May 6, 1968.)

Docket No. 32015

BUNGE CORPORATION,
Plaintiff-Appellant,

—v.—

THE LONDON AND OVERSEAS INSURANCE CO., *et al.*,
Defendants-Appellees.

THE LONDON AND OVERSEAS INSURANCE CO., *et al.*,
Third-Party Plaintiffs-Appellants,

—v.—

BROOKS BANKER, as Treasurer of
American Express Company,
Third-Party Defendant-Appellee.

Before:

FRIENDLY and HAYS, *Circuit Judges* and
CLARIE, *District Judge.**

*Of the District Court for the District of Connecticut, sitting by designation.

Appendix

Appeals by plaintiff and third-party plaintiffs from a judgment of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge*, dismissing their complaints in an action on an insurance policy.

Reversed as to dismissal of the complaint; affirmed as to dismissal of the third-party complaint.

PHILIP C. SCOTT, New York, New York (Marc J. Luxemburg, Robert J. Paulus, and Dewey, Ballantine, Bushby, Palmer & Wood, New York, New York, on the brief), *for Plaintiff-Appellant.*

WILLIAM WARNER, New York, New York (William Garth Symmers, Frederick Fish, and Symmers, Fish & Warner, New York, New York, on the brief), *for Defendants-Appellees and Third-Party Plaintiffs-Appellants.*

PETER H. KAMINER, New York, New York (Edwin J. Wesley, George I. Gordon, and Winthrop, Stimson, Putnam & Roberts, New York, New York, on the brief), *for Third-Party Defendant-Appellee.*

HAYS, *Circuit Judge*:

Bunge Corporation was one of the holders of warehouse receipts on vegetable oil stored in the tanks of a warehousing subsidiary of the American Express Company. In late 1963 it was discovered that a massive fraud[1] had been perpetrated by one Tino De Angelis, president of a vegetable oil concern, and that there was little or no oil in the tanks. Bunge brought suit on a contract of insurance against the

[1]Popularly known as the "salad oil swindle."

issuing underwriters (hereinafter referred to collectively as "Lloyd's") to recover its losses. Jurisdiction is based on diversity of citizenship. Lloyd's denied liability under the contract but served a third-party complaint on the American Express Company. Thereafter, Bunge entered into a settlement with American Express and gave it a general release.

American Express then moved for summary judgment dismissing the third-party complaint. The court below granted the motion on the ground that the release given American Express by Bunge was binding on Lloyd's. However, in response to an oral motion by counsel for Lloyd's, the court also granted summary judgment dismissing the complaint in the main action, the action of Bunge against Lloyd's. The court ruled that Bunge's release of American Express had the effect of relieving Lloyd's of any obligation to Bunge under the insurance contract. We affirm as to dismissal of the third-party complaint, but reverse as to dismissal of Bunge's action against Lloyd's.

I.

An insurer who has not paid its insured's claim has no right in claims which the insured has against third parties. See, e.g., *Meredith* v. *The Ionian Trader,* 279 F. 2d 471, 474 (2d Cir. 1960); *Glens Falls Ins. Co.* v. *Wood,* 8 N. Y. 2d 409, 412, 208 N. Y. S. 2d 978, 979-80 (1960); *American Surety Co.* v. *Palmer,* 240 N. Y. 63, 67 (1925).

Since Bunge has executed a release, its rights against American Express are extinguished; thus, even if Lloyd's were now to pay Bunge in full, it would succeed to no rights against American Express.

It follows that the third-party complaint was properly dismissed.

Lloyd's contention that our decision in *St. Paul Fire & Marine Ins. Co.* v. *United States Lines Co.*, 258 F. 2d 374 (2d Cir. 1958), cert. denied, 359 U. S. 910 (1959), requires a contrary result is without merit. The court there found that the purposes of Rule 14(a) of the Federal Rules of Civil Procedure—avoidance of a multiplicity of suits and inconsistent adjudications—would be furthered by interpreting the Rule to permit an insurance company which had not made payment to implead a third party. The court did not purport to change the law of subrogation as to the rights of non-paying insurers against such third parties.

II.

It is well settled that, at least after a denial of liability by an insurer, the insured may enter into a settlement with a third party without prejudicing its rights against the insurer. See, e.g., *Vanguard Ins. Co.* v. *Polchlopek,* 18 N. Y. 2d 376, 382, 275 N. Y. S. 2d 515, 520 (1966); *Cardinal* v. *State,* 304 N. Y. 400, 410-11 (1952), cert. denied as not timely applied for, 345 U. S. 918 (1953); *In re People ex rel. Emmet* (*Empire State Surety Co.*), 214 N. Y. 553, 563-64 (1915).

To require that the insured first fully litigate its dispute with the insurer before pursuing the third party would be manifestly unfair. The possibility of prompt reimbursement would be lost. Moreover, because of the financial condition of the third party or the size of other claims pending against it, it might be essential that redress against the third party be promptly pursued lest nothing remain to satisfy insured's claim. On the other hand, the self-interest on the insured affords considerable protection to the insurer under the present rule. Recognizing the possibility

that his suit against the insurance company may fail, the insured will attempt to recoup as much of his losses as possible from the third party. If the insurer is ultimately held liable, the amount so recovered will inure to its benefit.

Of course, it remains open to Lloyd's to challenge the settlement on the ground that it was entered into in bad faith; certainly an insured cannot claim as losses such amounts as it could have recouped in a good faith settlement.

The judgment is reversed as to dismissal of Bunge's complaint against Lloyd's and affirmed as to dismissal of the third-party complaint.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of May one thousand nine hundred and sixty-eight.

Present:

HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
Circuit Judges,
HON. T. EMMET CLAIRE,
District Judge,

DOCKETED AS A JUDGMENT #69,419 ON July 9, 1968 AT

BUNGE CORPORATION,
Plaintiff-Appellant,

v.

THE LONDON AND OVERSEAS INSURANCE COMPANY, LIMITED, *et al.*,
Defendants-Appellees and Third-Party Plaintiffs-Appellants,

BROOKS BANKER, as Treasurer of American Express Company,
Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Appendix

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed as to dismissal of the plaintiff-appellant's complaint against defendants-appellees and that said judgment be and it hereby is affirmed as to the dismissal of the third-party complaint, in accordance with the opinion of this court, with costs to the plaintiff-appellant.

A. DANIEL FUSARO
Clerk

APPENDIX

Opinion No. 34,257 by Ryan, D. J., Granting Summary Judgment Dismissing Both Third-Party Plaintiffs' Complaint and Plaintiffs' Complaint (Record 377-397)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

DECISION OF THE COURT

(Ryan, *D. J.*)

We have before us a motion by American Express Company (Amexco), third party defendant, for an order lifting the stay of all proceedings in the third party action directed by order of this Court dated October 6, 1965, and for summary judgment dismissing the third party complaint on the ground that the claims asserted there have been released and the third party defendant is entitled to judgment as a matter of law. Bunge, the plaintiff in this action, has joined in Amexco's motion.

The principal suit is on an insurance contract, and the third party complaint of defendant insurers is on a theory of subrogation in the event insurers are held to pay under their contract. The release pleaded by Amexco as a bar to the third party complaint flows from a settlement agreement

entered into between Bunge and Amexco and payment by the latter on the claims in suit.[1]

Amexco and Bunge take the position that there are no questions of fact which need resolution prior to judgment, only a question of law: whether the release given by Bunge, the insured, prior to any payment from the defendant insurers to Amexco, the alleged third party wrongdoer, bars the insurers from prosecuting their claim against Amexco. Maintaining that the release is clear and unambiguous, they urge that judgment of dismissal upon the merits is proper.

In an attempt to defeat the entry of judgment in favor of Amexco, while they remain as defendants the defendant insurers raise what they contend are questions of fact: the extent and scope of the settlement agreement; whether the release is full or partial; whether the receipts sued on are those released; the insurers' right to release and destroy the insurers' subrogation rights. The insurers argue that the fact that Bunge is continuing its suit against them while, at the same time, urging the surrender of their right to subrogation, raises a question as to the extent of the release Bunge gave Amexco. And that, if Bunge did not give a full release, then, as a matter of law, it had no right to reach an agreement with Amexco extinguishing the insurers' potential subrogation rights. The insurers have made no formal motion for summary judgment. They did move orally on the hearing and they have argued that summary judgment for them follows as a consequence of the

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[1]BUNGE's suit against the insurers is on a property loss policy, not on an indemnity policy indemnifying BUNGE against lawsuits; the insurers, therefore, had an absolute right to defend themselves from BUNGE's claim without prejudice. Therefore, the cases cited by AMEXCO and BUNGE to the effect that an insurer, in disclaiming liability, runs the risk of being bound by the settlement made by its insured with the third party, are irrelevant.

entry of judgment in favor of Amexco. We agree. Summary judgment is proper for Amexco as well as for the insurers for the reason that the release to Amexco was a full release of all of Bunge's claim and that this released all claim of subrogation and, as a matter of law, effected a release of the insurers.

We find that there are no issues of fact.

The settlement and release are as unambiguous as human language can make them. The release is complete and unfettered; the agreement, Bunge's acceptance, and the affidavits and exhibits submitted on this motion make clear that the release deals with the same receipts as those underlying Bunge's suit against the insurers. The other questions raised by the insurers are questions of law to be answered by the Court.

Before turning to the agreement of settlement and release, the "Proposal" of Amexco and "Acceptance" of Bunge and other creditors of Limited, we pause to look at the background of this suit.

In November, 1964, Bunge, brought suit against defendant-insurers under a policy to recover for losses of oil owned by Bunge represented by 17 warehouse receipts issued by American Express Warehousing, Ltd.—the warehousemen and subsidiary of Amexco—to Bunge to secure a debt due it from Allied, not directly involved in this suit. The loss is alleged to have occurred when Limited delivered Bunge's oil to Allied on orders to which Allied had forged Bunge's name. The oil was never recovered; the debt to Bunge was never paid; and Allied went into bankruptcy and Limited into Chapter XI arrangement proceedings. The losses of Bunge are claimed to amount to over $20,000,000.00.

The terms of the policies are not in dispute.

Appendix

Defendant insurers answered and admitted their execution, denied liability on them, and pleaded several affirmative defenses: non-existence of the oil, no insurable interest or title in plaintiff, misrepresentation and concealment, failure to disclose risk, failure to give timely notice et cetera. The insurers pleaded over against Amexco on the theory that, if Bunge recovers against the defendants for any loss or losses alleged in its complaint, Amexco will be liable over to the defendants who will have been subrogated to the plaintiff's rights against Amexco. This claim is based on the allegation that Amexco was the owner of Limited and that, through Limited, it held itself out to the plaintiff and others as conducting a warehousing business. Third Party Defendant has never answered.

Negotiations by Amexco, looking toward settlement of claims arising out of Limited's operations, were had with the numerous claimants who suffered losses as a result of Limited's warehousing activities. They began before the institution of this suit and continued until a settlement agreement with Bunge among others became binding on October 15, 1965 subject to the fulfillment of certain conditions. Those conditions ripened on June 14, 1967, and the settlement and release became effective. During the pendency of these much-publicized negotiations, this third party suit of insurers against Amexco was twice stayed by this Court at the behest of Bunge and Amexco, once on May 20, 1965 and again on October 6, 1965 until further order of this Court. Pending the effective date of the settlement which has been reached, Bunge had consented not to prosecute further or continue any action or suit against Amexco, and it was on that basis that Amexco and Bunge moved for a stay of the suit and that it was granted. A mo-

tion made by third party defendants to dismiss the third party complaint was denied by me on May 6, 1965.

We now come to the terms of the settlement to which Bunge consented.

The proposal of Amexco in Article VI, Paragraph E, contains the covenant not to suit [sic] or continue suit against Amexco, and sets forth the release of Bunge as follows:

> "(b) effective only upon the Consummation Date, by these presents Bunge does hereby release Amexco and its affiliates from any claim which now exists or hereafter arises and which in any way, directly or indirectly, is based upon, arises from or involves the subject matter of, or any portion of the subject matter of, any one or more of Bunge's Receipt Claims that are the subject of its acceptance or any transaction relating to any such Receipt Claim or Receipt Claims, and any claim which now exists or hereafter arises for damages that would not have been sustained in whole or in part if Limited had delivered the commodities referred to in the Receipt or Receipts to which such Receipt Claim or Receipt Claims relate . . ."
>
> "provided, however, that
>
> "(i) it is the intention of Amexco in making this Proposal and of the Acceptor in accepting it that nothing contained herein shall constitute a waiver of any right of Amexco, any Acceptor, Limited, Lawrence American, other creditors of Limited, creditors of Lawrence American and all other interested parties against the Insurers and that there be preserved to the

persons having such rights the benefits thereof against the Insurers, and in order to preserve such rights to the Acceptor, here is excepted from the foregoing release those rights, if any, which as a matter of law the Insurance may have, or acquire, by way of subrogation to the rights of the Acceptor, it also being agreed that the foregoing covenant shall not bar the assertion of such rights by the Insurers;"[2]

"(iv) if (a) in subparagraph (iii) of paragraph 1 of the Form of Acceptance the Acceptor has made, in accordance with the provisions there set forth, an election permitted by such subparagraph (iii) and (b) Amexco has determined, in its sole judgment, that the indemnity or undertaking furnished by such Acceptor is sufficient, then, in that event but only in that event, there is excepted from the foregoing release those rights, if any, which is a matter of law an insurer or alleged insurer of such Acceptor listed under Table D of such subparagraph (iii) may have, or acquire, by way of subrogation to the rights of such Acceptor, it also being agreed that the foregoing covenant shall not bar the assertion of such rights by such insurer."

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[2]The term "Insurer" is thus defined: "As used in this Proposal, the term 'insurers' means those companies and firms which have issued (or which Limited, Field or Amexco contends have issued) policies, bonds and other contracts of insurance (including cover notes issued by agents on their behalves), premiums for which were paid by Limited Field or Amexco."

It is conceded that the defendants here do not come within the definition and that no claim of reservation of rights against them is founded on this provision.

Appendix

The Form of Acceptance referred to was appended to the Proposal and all receipt claimants, including Bunge, accepting the Amexco proposal, were required to complete it with the information sought under Paragraph "B" of this Article VI. There, an acceptor who claimed to be insured for a loss in respect of warehousing receipts, and had not received payment on its claim from the insurer, had three options open to it under the settlement. The acceptor had the choice (1) of obtaining the consent of the insurer to the settlement by having it endorse the Form of Acceptance; of (2) of such consent was not obtained, of supplying full details as to the insurance on the Form of Acceptance and furnishing Amexco with indemnity for expenses, including counsel fees and disbursements or loss suffered by it "in connection with any claim heretofore or hereafter asserted by, or in the right of such insurer in respect of any Receipt Claim that is the subject of the acceptance"; or (3) in addition to supplying all the information above required, it could elect to preserve the subrogation rights of certain of its insurers if it complied with the provisions relating to such election set forth in the Form of Acceptance and furnished the indemnity required under the Form of Acceptance for holding harmless Amexco from resulting loss or expense suffered by it in connection with any claim brought by an insurer or for its benefit.

The Form of Acceptance provided that:

> ". . . where a Receipt Claimant wishes to have excepted from the release provided for in Section E of Article VI of this Proposal those rights, of (sic) any, which as a matter of law an insurer or alleged insurer listed under Table C next above may have, or acquired, by way of subrogation to the rights of

such Receipt Claimant, such Receipt Claimant may elect so to do by (and only by) inserting under Table D next below the name of the insurer or alleged insurer and the date and number of the policy or policies with respect to which such election is made. Any such insertion shall constitute such an election."

Bunge did not obtain the consent of the defendant-insurers under (1) above, but did supply the information required under (2) by listing the name of the defendant insurers and the amount of the insurance as $20,244,252.81 (being the same amount claimed in this action against the insurers) and by stating that the "claim against insurers is based upon oil represented by 17 receipts which were exchanged for Receipts No. F1194, 1195, 1199, 1200"; these receipts were also listed in another part of the Acceptance as being those in respect to which it wished to accept the Proposal and under which Bunge was the only receipt claimant. This information was stated in Table "C" of Bunge's Form of Acceptance attached to the Proposal. Bunge did not make the election provided for under the third option and on its acceptance left Table D blank. We assume it furnished the indemnity required under Option "2" since this was a condition to acceptance.

There is no dispute between the parties to the agreement but that Bunge released "all claims and rights of action directly or indirectly arising from or involving the Allied-De Angelis frauds. . . ." and that this was their intent. The affidavit of counsel for Bunge who represented it on the negotiations emphasizes:

> "It was the intent and act of Bunge in releasing Amexco to completely and unequivocally release Amexco from, and to destroy and extinguish, all claims and rights of action covered by the release, including all claims and rights of action asserted against Amexco in the above-captioned action, which Bunge might have against Amexco or which anyone else deriving or claiming to derive through Bunge might have against Amexco, including any claim or right of action which Bunge's insurers, the defendants and third-party plaintiffs herein, might have or acquire against Amexco by way of subrogation to the rights of Bunge."

This is also the position taken by Amexco counsel, who states:

> "Accordingly, there can be no question that any claim for damages which Bunge might have had against Amexco relating to the 17 warehouse receipts referred to in the complaint at bar has been released."

The language of the Form of Acceptance was explicit and clear that the "only" way Bunge could reserve the rights of subrogation which the insurer might have against Amexco was by filling out Table D. It did not do so, and it released Amexco from all claims arising out of loss represented by the enumerated receipts.

That these are the same receipts as those pleaded in the complaint against the insurers is evident from the Proof of Claim and Amended Proof of Claim filed by Bunge in the Chapter XI arrangements proceedings of Limited. In these claims, Bunge states that:

> "These four (4) non-fungible warehouse receipts (Nos. F 1194, F 1195, F 1199 and F 1200) were received by Bunge as part of an exchange on November 7 and 11, 1963 whereby Bunge, which had previously held seventeen (17) other non-fungible warehouse receipts ('the 17 original receipts'), issued genuine delivery orders on the 17 original receipts on November 7 and 11, and received in exchange the four (4) receipts listed above."

Moreover, one of the defenses pleaded by the insurers is that, at the time of the loss, Bunge was not the owner of the 17 warehouse receipts (representing the oil insured by defendant) because it had surrendered them for four other warehouse receipts on which defendant-insurers had not issued insurance and that Bunge, therefore, could not recover.

By affidavit of Bunge's vice president, it is stated that:

> "In accepting the Amexco settlement Bunge released and intended to release all claims which it might have had against Amexco relating not only to the four warehouse receipts specifically listed by number in its acceptance but relating to the 17 warehouse receipts which are the subject of this action as well. Bunge did not preserve and did not intend to preserve any rights against Amexco which its insurers, the defendants and third party plaintiffs herein, might have obtained from Bunge by subrogation or otherwise."

It is quite evident from this why Bunge did not fill out Table "D." This Table "D" was to be filled out only in the event that a claimant excepted from his acceptance of the proposal some of his receipts and with it excepted from

the release such rights of subrogation which attached to these receipts. Since Bunge had excepted no receipts, it would have been inconsistent, if not a nullity, for it to have attempted to except from the release subrogation rights which no longer existed.

The question of law is presented: whether Bunge had the lawful right to extinguish these rights of subrogation. It is settled that it had. The consequence of having done so was to extinguish the entire claim and to release the defendant insurers. The fact that it has continued its suit against the insurer lends no support to the contention that it has any claim remaining. We hold that, under the circumstances, the defendant insurers should not be held in this action and be obliged to plead these undisputed facts as an affirmative defense. Bunge has settled in full by accepting payment from Amexco and has no claim left to enforce against the insurers.

It is conceded that the insurers have not paid anything to Bunge. Under the settled law, the insurers' right of subrogation had not attached when Bunge consummated its settlement with Amexco; it was contingent on Bunge's recovering on the insurance policies. Amexco, when it laid down the conditions for acceptance of its Proposal by Bunge, required disclosure of payments by the insurer to Bunge or any holder of the receipts on which Bunge claimed. With knowledge on the part of Amexco of Bunge's claim against its insurers, it is plain that both Amexco and Bunge were well aware that, if any payments had been made by the insurers, their rights to subrogation could not be destroyed by agreement between Amexco and Bunge (*Ocean* v. *Hooker*, 240 N. Y. 37). Because Bunge certified that it had received no payment from the insurers and

Amexco did not know to the contrary, the right to subrogation could be extinguished prior to any payment by release of the claim to which subrogation would attach, if the insurers had been compelled to pay out on it. "The right grows out of the very nature of the contract of insurance as a contract of indemnity," and there is no need of an express provision preserving the right (*Richmond Phoenix Ins. Co.* v. *Erie & W. Trans. Co.*, 117 U. S. 312; *Glen Falls Co.* v. *Wood*, 8 N. Y. 2nd 409). If the claim under the contract of insurance no longer exists and has been released, then the right to subrogation no longer exists. The reason is obvious—the right of subrogation means that the insurer, after having paid the insured, stands in the shoes of the insured to prosecute the claim the insured had against the third party wrongdoer who caused the loss insured.

Bunge, having released the wrongdoer in toto, extinguished the res to which subrogation could have attached and there was claim left against either the wrongdoer or the insurer. This was done intentionally and with full knowledge of the legal consequences. Just as there is no need to expressly provide for the right of subrogation under a contract of insurance there was no requirement that Bunge, upon payment in accord and satisfaction of the loss under the contract by a third party, expressly waive the right of subrogation. This followed as a matter of law. It was recognized in the language of Table "D" which excepted "those rights, if any, which as a matter of law an insurer or alleged insurer may have or acquire by way of subrogation to the rights of Bunge."

Connecticut Fire Ins. Co. v. *Erie Ry. Co.*, 73 N. Y. 399, cited by the insurers for the proposition that the insured and the wrongdoer may not settle the claim insured against

and release the wrongdoer and, at the same time, reserve rights against the insurers without suffering the consequences of this reservation (i.e., survival of its right of subrogation against the wrongdoer in spite of the general release) is illustrative of the settled principle that subrogation follows the claim. In that case, the settlement between the insured and the tortfeasor was partial, for part of the loss insured and, although a general release was given, there was an *express reservation* of rights against the insurer. The Court held that, so long as part of the loss survived and the insured reserved its rights against the insurer, the general release would not be given effect because the right of the insurer to claim over against the third party also had to survive. "The power to enforce the policy having been expressly reserved, the parties could not take away the right of plaintiff (insurer) to the remedy which that reservation vested in him by law." (id. p. 405). The exception against the insurer necessarily embraced the right of subrogation.

Factually, we have the converse of the situation which was before the Court in that case, but the identical proposition of law—that the right of subrogation follows the right to sue under the policy.

Seligson v. *Fidelity & Cas. Co.* v. *Amexco,* N. Y. L. J., 12/2/66, p. 16, Col. 3, Sup. Ct. N. Y. Co., and the opinion of this Court of October 6, 1965, granting a stay of the third party action by the insured against Amexco and permitting the main action to continue while the settlement agreement was pending, is no indication by either Court that the main action would survive a full settlement and dismissal of the third party complaint. Both the State Court and this Court denied Amexco's motion to dismiss the third party complaint against it while the settlement agreement

had not been consummated, but granted Amexco's motion to stay all further proceedings because, under the agreement, the insured had convenanted not to sue or further prosecute its claims. This was impliedly a recognition that the principal suit brought by the insured was the same as that brought by the third party plaintiff, or the covenant by plaintiff not to sue Amexco would not have affected the insurers' complaint pending against Amexco. Judge Korn in a subsequent decision of June 21, 1967, in the same action, pointed out:

> "As this Court has already recognized, when the settlement is in fact consummated, the release of Amexco will extinguish all claims to which the Haupt insurer might otherwise become subrogated and the third-party action will then become moot."

It does not appear that, in either Court, the insurer moved for a stay of the action against it, so that the fact that none was granted is of no significance. It affirmatively appears in this action before us that, by mutual agreement, all proceedings against the insurer by Bunge were stayed.

We conclude that, having fully released Amexco, Bunge extinguished its insurance contract claim against insurers, and that there is no claim supporting either the third party complaint or the principal complaint.

Summary judgment is granted for defendant and third party defendant. The Clerk is directed to forthwith enter judgment of dismissal upon the merits of the plaintiff's complaint and of the third party complaint. So ordered.

Dated: New York
December 14, 1967

/s/ SYLVESTER J. RYAN
U. S. D. J.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 485

THE LONDON and OVERSEAS INSURANCE CO., *et al.*,

Petitioners,

v.

BUNGE CORPORATION, and BROOKS BANKER, as Treasurer of American Express Company,

Respondents.

BRIEF OF RESPONDENT BUNGE CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Preliminary Statement

This brief is submitted in opposition to the petition for a writ of certiorari by petitioners The London and Overseas Insurance Company, *et al.* ("Lloyds"). Respondent Bunge Corporation ("Bunge"), plaintiff in the lower court, brought this action against Lloyds, and Lloyds thereafter commenced a third-party action against Brooks Banker as Treasurer of American Express Company ("American Express"). As part of a settlement of claims by certain warehouse receipt holders against American Express, Bunge gave a general release to American Express. Thereafter the District Court granted a motion by American Express for summary judgment dismissing Lloyds' third-party claim, and as part of the same decision also granted summary judgment dismissing Bunge's claim against Lloyds.[1] On appeal from that decision, the Court of Appeals for

[1] 64 Civ. No. 3440 (S. D. N. Y. Dec. 14, 1967).

the Second Circuit affirmed the dismissal of Lloyds' third-party complaint but reversed the dismissal of Bunge's claim against Lloyds.[2] Lloyds now seeks a review of this decision by its petition for a writ of certiorari.

Question Presented

Insofar as the petition seeks review of the decision below as it affects Bunge's rights, the question presented is:

Whether, after an insurer has denied liability, the insured may, incident to a good faith settlement, release a third party claimed to be liable for the insured's loss, and retain its rights against the insurer for uncompensated loss, where the settlement and the resulting release occurred subsequent to the commencement of an action by the insured against the insurer, and subsequent to the impleader of the third party by the insurer pursuant to Rule 14(a) of the Federal Rules of Civil Procedure.

Statement of the Case

Bunge had insured with Lloyds certain vegetable oil which was stored in a warehouse operated by a wholly owned subsidiary of American Express. Warehouse receipts for this oil had been issued to Bunge. The oil disappeared and was never delivered to Bunge. Bunge filed a proof of claim with Lloyds which was rejected, and, accordingly, this diversity action was commenced. Bunge claimed damages in the amount of approximately $20,000,000. (4a-27a).[3] Lloyds' answer admitted the execution and delivery of the policies of insurance, but denied liability upon various grounds including non-existence of the oil at the time the insurance was placed; non-disclosure, concealment and misrepresentation in obtaining the insur-

[2] 394 F. 2d 496 (2d Cir. 1968).

[3] All references are to the appendix in the court below.

ance; that the insurance was null and void from its inception; and others. (40a-46a). Shortly after answering, Lloyds filed its third-party complaint against American Express. (47a-49a).

Both prior to and during the pendency of the present action, Bunge and numerous other warehouse receipt claimants had been negotiating with American Express concerning settlement of claims asserted against it. American Express vigorously disputed that it was in any way liable to any claimant. Bunge's claim arose out of the disappearance of the same vegetable oil which was the subject of Bunge's insurance with Lloyds and of the present action. (100a).

After the commencement of the third-party action herein, and after due notice to Lloyds, an agreement of settlement was entered into by Bunge and the other claimants, on the one hand, and American Express on the other. The terms of the settlement were that American Express would contribute approximately $60,000,000 to be divided pursuant to a certain formula among the various claimants, and, in exchange, all of the claimants, including Bunge, would release American Express from any claims arising out of the disappearance of the oil.[4] The settlement, which was to become final upon the occurrence of certain conditions, was subsequently consummated, and Bunge's release of American Express thereupon became effective. (100a-101a).

American Express then moved for summary judgment dismissing the third-party complaint. (95a). The ground of the motion was that since the third-party claim of Lloyds

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[4]Bunge's share of this settlement will be between approximately $9,000,000 and $12,500,000, depending upon the outcome of certain other litigation. Bunge has never disputed that Lloyds would be entitled to a credit for any net amount Bunge receives pursuant to the settlement with American Express. Bunge's entire net recovery from this settlement will thus inure to the benefit of Lloyds in the event of its liability to Bunge.

was concededly based upon potential subrogation—that is, it was asserted in the right of Bunge—and since Bunge had released all of its claims against American Express, the potential third-party claim of Lloyds was, as a matter of law, also released. The District Court granted this motion and dismissed the third-party claim, holding that Bunge had the power to give a release to American Express which was binding upon Lloyds, but the court on Lloyds' "oral motion" also dismissed Bunge's claim against Lloyds, holding that Bunge, having "destroyed" Lloyds' subrogation rights, had extinguished its claim against Lloyds.

On appeal, the Second Circuit affirmed the lower Court's dismissal of Lloyds' third-party complaint, but reversed the dismissal of Bunge's complaint, stating that it was "well settled" that after a denial of liability by an insurer, the insured may enter into a good faith settlement with a third party without prejudicing its rights against the insurer. Lloyds now petitions for a writ of certiorari to review the decision of the Second Circuit. It is our position that there is no basis for the granting of the writ and the petition should be denied.

Argument

The holding of the Second Circuit that the law is "well settled" that, after a denial of liability by an insurer, the insured may enter into a good faith settlement with a third party without prejudicing its rights against the insurer, is a restatement of one of the basic propositions of insurance law and is supported by every case we know of in which this issue has been faced.

The principal New York cases are *Vanguard Ins. Co.* v. *Polchlopek,* 18 N.Y.2d 376, 275 N.Y.S.2d 515, 222 N.E.2d 383 (1966); *Cardinal* v. *State,* 304 N.Y. 400, 107 N.E.2d 569 (1952), *motion to amend remittitur*

denied, 304 N.Y. 875, 109 N.E.2d 885 (1952), *cert. denied*, 345 U.S. 918 (1953); and *In re People ex. rel. Emmet (In re Empire State Sur. Co.)* 214 N.Y. 553, 108 N.E. 825 (1915). *Accord, Dinn Oil Co.* v. *Hanover Ins. Co.*, 87 Ill. App. 2d 123, 230 N.E.2d 702 (1967); *Poole* v. *William Penn Fire Ins. Co.*, 264 Ala. 62, 84 So. 2d 333 (1955); *Roberts* v. *Fireman's Ins. Co.*, 376 Pa. 99, 101 A.2d 747 (1954); *Powers* v. *Calvert Fire Ins. Co.*, 216 S. C. 309, 57 S.E.2d 638 (1950).

Other cases to the same effect are, *e. g., St. Louis Dressed Beef & Provision Co.* v. *Maryland Cas. Co.*, 201 U.S. 173 (1906); *National Sur. Corp.* v. *Rauscher, Pierce & Co.*, 369 F.2d 572 (5th Cir. 1966), *cert. denied*, 386 U.S. 1018 (1967); *American Mut. Liab. Ins. Co.* v. *Buckley & Co.*, 117 F.2d 845 (3d Cir. 1941); *Ross-Field Corp.* v. *Underwriters at Lloyd's*, 164 Cal. App. 2d 83, 330 P. 2d 432 (1958); *Thomas W. Hooley & Sons* v. *Zurich Gen. Acc. & Liab. Ins. Co.*, 235 La. 289, 103 So. 2d 449 (1958); *United States Fid. & Guar. Co.* v. *National Paving & Contracting Co.*, 228 Md. 40, 178 A.2d 872 (1962).

The petitioners suggest that the Second Circuit did not properly construe the New York law. Petitioners cite several cases which they allege support this suggestion, but none of these cases deals with the specific issues which are presented here, and none of these cases involves a holding in conflict with the principle set forth above and applied by the Second Circuit. Indeed, within the past week the New York Supreme Court relied on the very opinion of the Second Circuit below, and upon the cases cited in that opinion, in deciding a case involving substantially the precise facts of the instant case, as it arose out of the same settlement with American Express that is involved here. The Court held that the insured did not lose its rights against its insurers when it released American Express

after a denial of liability by the insurers. *Scarburgh Co.* v. *Employers' Surplus Lines Ins. Co.,* Index No. 18763/1965 (Sup. Ct. N. Y. Co. Sept. 30, 1968). There is thus no question involved concerning the intepretation of New York substantive law by the Second Circuit which would warrant a review by this Court.

The real thrust of petitioners' argument is that commencement of a third-party action under Rule 14(a) somehow changes the substantive law in one manner or another.[5] Petitioners' whole position must rest on the implied assertion that because Rule 14(a) gives them the procedural right to bring the third-party action, it thereby necessarily vests them with the substantive right to control the disposition of the insured's claims against the third party, a right which they do not otherwise have.

That neither Rule 14(a) nor any other rule enlarges or otherwise affects substantive rights is basic to the very fabric of the federal rules. The Federal Rules Enabling Act, 28 U. S. C. § 2072 (1964), plainly states:

> "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions . . . .
>
> "Such rules shall not abridge, enlarge or modify any substantive right . . . ."

The cases have consistently interpreted the rules to reflect this. *See United States* v. *Sherwood,* 312 U. S. 584, 589-90 (1941); *Travelers Ins. Co.* v. *Busy Elec. Co.,* 294 F.2d 139

[5]Petitioners assert that commencement of the third-party action under Rule 14(a) either (i) deprived Bunge of the power to give American Express a release effective against Lloyds, or (ii) allowed Bunge the power to give such a release, but only at the cost to Bunge of also releasing Lloyds.

(5th Cir. 1961); *Smith* v. *Whitmore*, 270 F. 2d 741 (3d Cir. 1959).

Petitioners assert that the cases of *Glens Falls Indem. Co.* v. *Atlantic Building Corp.*, 199 F.2d 60 (4th Cir. 1952), and *St. Paul Fire & Marine Ins. Co.* v. *United States Lines Co.*, 258 F. 2d 374 (2d Cir. 1958), *cert. denied*, 359 U. S. 910 (1959), stand for the proposition that under Rule 14(a) a non-paying third-party plaintiff insurance company does have the substantive rights asserted here, and that the decision of the Second Circuit is therefore in conflict with these decisions. Examination of those cases reveals, however, that they stand for nothing more than the proposition that an insurance company, despite its lack of payment, does have the right to implead a third-party pursuant to Rule 14(a). The decision of the court below is entirely in accord with those cases. Neither of those cases dealt with the question of whether commencement of a third-party action under Rule 14(a) enlarges the substantive rights of the insurer, as was expressly recognized by the court below, and those cases are thus not in point.

Further, petitioners' attempt to suggest that New York substantive law is unsettled is based on the same misconception. The New York Court of Appeals, in *Krause* v. *American Guar. & Liab. Ins. Co.*, 22 N. Y. 2d 147, 292 N. Y. S. 2d 67, 239 N. E. 2d 175 (1968), faced the parallel issue under New York law as the federal courts dealt with in the *Glen Falls* and *St. Paul* cases under federal law—namely, whether a defendant insurer had any right whatsoever, prior to payment, to implead a third party under the impleader section of the New York Civil Practice Law and Rules,[6] a section which is precisely parallel in terms to Rule 14(a) of the Federal Rules of Civil Procedure. The New York Court of Appeals held that the insurer did have the procedural right

[6] C.P.L.R. § 1007.

to implead a third party. It was expressly argued to that Court that to allow impleader would alter substantive rights. While acknowledging that the question of the insured's rights against his insurer by reason of the insured's settlement and release of the third party was not before it, the Court significantly stated:

> "The assertion that the insured will be deprived of control of his claim against the alleged tort-feasor is of no merit as is the similar argument that it will delay settlements between the two. The insured is free to press on with its claim or, if no payment has been made by the insurer, settle as the insured desires. (Cf. *Ocean Acc. & Guar. Corp.* v. *Hooker Electrochem. Co.*, 240 N. Y. 37)." 22 N.Y.2d at 72, 292 N. Y. S. 2d at 72, 239 N. E. 2d at 179 (footnote omitted).

CONCLUSION

It is respectfully submitted that petitioners have failed to demonstrate any substantial reason why this court should grant a writ of certiorari in this case, and that the petition should therefore be denied.

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New York, New York
October 4, 1968

IN THE

Supreme Court of the United States

No. 485

THE LONDON and OVERSEAS INSURANCE CO., *et al.*,
Petitioners,

v.

BUNGE CORPORATION, and BROOKS BANKER,
as Treasurer of American Express Company,
Respondents.

BRIEF OF RESPONDENT BUNGE CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

This brief is submitted in opposition to the petition for a writ of certiorari by petitioners The London and Overseas Insurance Company, *et al.* ("Lloyds"). Respondent Bunge Corporation ("Bunge"), plaintiff in the lower court, brought this action against Lloyds, and Lloyds thereafter commenced a third-party action against Brooks Banker as Treasurer of American Express Company ("American Express"). As part of a settlement of claims by certain warehouse receipt holders against American Express, Bunge gave a general release to American Express. Thereafter the District Court granted a motion by American Express for summary judgment dismissing Lloyds' third-party claim, and as part of the same decision also granted summary judgment dismissing Bunge's claim against Lloyds.[1] On appeal from that decision, the Court of Appeals for

[1] 64 Civ. No. 3440 (S. D. N. Y. Dec. 14, 1967).

the Second Circuit affirmed the dismissal of Lloyds' third-party complaint but reversed the dismissal of Bunge's claim against Lloyds.[2] Lloyds now seeks a review of this decision by its petition for a writ of certiorari.

Question Presented

Insofar as the petition seeks review of the decision below as it affects Bunge's rights, the question presented is:

Whether, after an insurer has denied liability, the insured may, incident to a good faith settlement, release a third party claimed to be liable for the insured's loss, and retain its rights against the insurer for uncompensated loss, where the settlement and the resulting release occurred subsequent to the commencement of an action by the insured against the insurer, and subsequent to the impleader of the third party by the insurer pursuant to Rule 14(a) of the Federal Rules of Civil Procedure.

Statement of the Case

Bunge had insured with Lloyds certain vegetable oil which was stored in a warehouse operated by a wholly owned subsidiary of American Express. Warehouse receipts for this oil had been issued to Bunge. The oil disappeared and was never delivered to Bunge. Bunge filed a proof of claim with Lloyds which was rejected, and, accordingly, this diversity action was commenced. Bunge claimed damages in the amount of approximately $20,000,000. (4a-27a).[3] Lloyds' answer admitted the execution and delivery of the policies of insurance, but denied liability upon various grounds including non-existence of the oil at the time the insurance was placed; non-disclosure, concealment and misrepresentation in obtaining the insur-

[2] 394 F. 2d 496 (2d Cir. 1968).

[3] All references are to the appendix in the court below.

(5th Cir. 1961); *Smith* v. *Whitmore*, 270 F. 2d 741 (3d Cir. 1959).

Petitioners assert that the cases of *Glens Falls Indem. Co.* v. *Atlantic Building Corp.*, 199 F.2d 60 (4th Cir. 1952), and *St. Paul Fire & Marine Ins. Co.* v. *United States Lines Co.*, 258 F. 2d 374 (2d Cir. 1958), *cert. denied*, 359 U. S. 910 (1959), stand for the proposition that under Rule 14(a) a non-paying third-party plaintiff insurance company does have the substantive rights asserted here, and that the decision of the Second Circuit is therefore in conflict with these decisions. Examination of those cases reveals, however, that they stand for nothing more than the proposition that an insurance company, despite its lack of payment, does have the right to implead a third-party pursuant to Rule 14(a). The decision of the court below is entirely in accord with those cases. Neither of those cases dealt with the question of whether commencement of a third-party action under Rule 14(a) enlarges the substantive rights of the insurer, as was expressly recognized by the court below, and those cases are thus not in point.

Further, petitioners' attempt to suggest that New York substantive law is unsettled is based on the same misconception. The New York Court of Appeals, in *Krause* v. *American Guar. & Liab. Ins. Co.*, 22 N .Y. 2d 147, 292 N. Y. S. 2d 67, 239 N. E. 2d 175 (1968), faced the parallel issue under New York law as the federal courts dealt with in the *Glen Falls* and *St. Paul* cases under federal law—namely, whether a defendant insurer had any right whatsoever, prior to payment, to implead a third party under the impleader section of the New York Civil Practice Law and Rules,[6] a section which is precisely parallel in terms to Rule 14(a) of the Federal Rules of Civil Procedure. The New York Court of Appeals held that the insurer did have the procedural right

[6] C.P.L.R. § 1007.

to implead a third party. It was expressly argued to that Court that to allow impleader would alter substantive rights. While acknowledging that the question of the insured's rights against his insurer by reason of the insured's settlement and release of the third party was not before it, the Court significantly stated:

> "The assertion that the insured will be deprived of control of his claim against the alleged tort-feasor is of no merit as is the similar argument that it will delay settlements between the two. The insured is free to press on with its claim or, if no payment has been made by the insurer, settle as the insured desires. (Cf. *Ocean Acc. & Guar. Corp.* v. *Hooker Electrochem. Co.*, 240 N. Y. 37)." 22 N.Y.2d at 72, 292 N. Y. S. 2d at 72, 239 N. E. 2d at 179 (footnote omitted).

CONCLUSION

It is respectfully submitted that petitioners have failed to demonstrate any substantial reason why this court should grant a writ of certiorari in this case, and that the petition should therefore be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 485

THE LONDON AND OVERSEAS INSURANCE CO., *et al.*,
Petitioners,

v.

BUNGE CORPORATION and BROOKS BANKER, as Treasurer of AMERICAN EXPRESS COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT BROOKS BANKER, AS TREASURER OF AMERICAN EXPRESS COMPANY, IN OPPOSITION

QUESTION PRESENTED

Whether a defendant-insurer which has denied liability to its insured can, by exercising its procedural right to implead a third party, deprive its insured of the power to make a settlement with and give a general release to such third party where the insurer has made no payment to its insured and has not become subrogated to any of its insured's rights.

STATUTE INVOLVED

Although the motion below was one for summary judgment and decided on fundamental principles of substantive law, petitioners claim that the statute involved is the procedural impleader rule, Rule 14(a) of the Federal Rules of Civil Procedure, which they set forth at pages 2-4 of their petition. Respondent submits that Rule 14(a) cannot affect the determination of such a motion in view of 28 U. S. C. § 2072, the first two paragraphs of which provide:

> "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Courts of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.
>
> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

STATEMENT

This action arises out of the discovery in November, 1963, of a major fraud, perpetrated by Allied Crude Vegetable Oil Refining Corporation ("Allied") and its president, Anthony DeAngelis (98a).[1]

The Allied-DeAngelis fraud involved improper removal of or failure to deposit commodities certified by Allied to have been stored with American Express Warehous-

[1]All references are to pages of the appendix in the Court below unless otherwise indicated. All emphasis is supplied throughout unless otherwise indicated.

ing, Ltd. ("Limited"), a wholly-owned subsidiary of American Express Company ("Amexco"), the theft and forgery of blank warehouse receipt forms of Limited, and the forgery of delivery orders presented to Limited. Respondent Bunge, the plaintiff in this action, is one of many companies that claimed substantial losses as a result of Allied's fraud (98a).

Immediately after the discovery of the Allied-DeAngelis fraud Amexco stated that while it had no legal liability in the matter it felt morally bound to do everything it could, consistent with its overall responsibilities, to see that the liabilities of its warehousing subsidiaries were satisfied (100a; *Heimann* v. *American Express Co.*, 53 Misc. 2d 749, 753, 767 (Sup. Ct. N. Y. Co. 1967)). After long negotiations a comprehensive proposal was made for the settlement of litigation and potential litigation by warehouse receipt claimants calling for the payment by Amexco of approximately $60,000,000. The proposal was signed by Bunge on September 15, 1965 and on October 15, 1965 it became a binding agreement on Amexco, Bunge and almost all claimants under warehouse receipts issued or purportedly issued by Amexco's present and former warehousing subsidiaries. The agreement provided that upon consummation of the settlement Amexco would be released from all claims of Bunge or any subrogee of Bunge based upon the warehouse receipts.[2] After the satisfaction of all conditions precedent, the settlement was consummated on June 14, 1967 (101a).

Prior thereto, on November 12, 1964, Bunge commenced the primary action at bar, alleging that certain vegetable oil covered by warehouse receipts issued by Limited to Bunge was converted by Allied or others and

[2] Excerpts from the specific terms of the release are set forth in Amexco's moving affidavit in the District Court (101a) and are quoted in the District Court's opinion (204a-206a and pp. 12a-15a of appendix to petition).

that such oil was covered by the insurance contracts issued by petitioners (4a-27a). The insurers admitted the execution and delivery of the insurance contracts, denied most of the remaining allegations of the complaint and asserted a number of affirmative defenses, including the defense that the insurance contracts were void because of alleged concealment and nondisclosure of facts by the insured (40a-46a). The insurers made no payment to Bunge and have consistently disclaimed all liability on the insurance contracts (179a-181a).

On December 21, 1964, the insurers impleaded Amexco. The sole basis of the insurers' claim against Amexco is that they will be subrogated to Bunge's rights against Amexco in the event they are compelled to pay Bunge (47a-49a, 99a).

On June 29, 1965, Bunge and Amexco obtained an order of the District Court staying all proceedings until October 1, 1965, in anticipation of the settlement becoming a binding contract (58a-64a, 74a-76a). After the settlement agreement was signed, all proceedings in the third-party action were stayed until further order of the District Court and that stay remained in effect for approximately two years. From the inception, in granting these stays, the District Court made it clear that once the settlement was consummated there would be no subrogation rights to which the insurer could succeed, that the third-party action would have to be dismissed when Bunge's release became effective, and that in the meantime the agreement preventing Bunge from suing Amexco pending the consummation of the settlement was binding on the insuers (74a, 89a-94a).

After the settlement was consummated, Amexco moved for summary judgment on the ground that the potential subrogation rights asserted in the third-party complaint had been extinguished by Bunge's release of Amexco (95a-107a). Amexco's motion was granted on December 14,

1967 (199a);[3] and the District Court also dismissed the primary action although no formal motion for such relief had been made. The Court of Appeals for the Second Circuit affirmed the District Court as to the third-party action and reversed it as to the primary action.[4] On June 10, 1968, petitions for rehearing and rehearing *en banc* were denied.

ARGUMENT

1. Petitioners have shown no reason whatsoever why this Court should grant certiorari. The Court below correctly decided the issue before it on the basis of thoroughly settled fundamental principles of both state and Federal law:

a. Prior to payment an insured is the sole owner of his claims against third parties and his insurer has no rights in those claims. *Meredith* v. *The Ionian Trader*, 279 F. 2d 471, 474 (2d Cir. 1960); *Glens Falls Ins. Co.* v. *Wood*, 8 N. Y. 2d 409, 412 (1960); *American Sur. Co.* v. *Diamond*, 1 N. Y. 2d 594, 598 (1956); *American Sur. Co.* v. *Palmer*, 240 N. Y. 63, 67 (1925); *American Sur. Co.* v. *Gerold*, 255 App. Div. 285, 287 (1st Dep't 1938).

b. Upon payment the insurer has the right "to step into the shoes of" the insured, but is "subject to all legal and equitable defenses which the third party may have against the [insured]." *Hartford Acc. & Indem. Co.* v. *First Nat'l Bank & Trust Co.*, 287 F. 2d 69, 72 (10th Cir. 1961); *Insurance Co. of N. America* v. *Morgan Dyeing & Bleaching Co.*, 262 F. 2d 916, 919 (7th Cir.

[3] 64 Civ. No. 6440 (S. D. N. Y.). Opinion reproduced in appendix to the petition, pp. 8a-21a.

[4] 394 F. 2d 496 (1968). Opinion reproduced in appendix to the petition, pp. 1a-5a.

1959); see also *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 242 (1947); *Phoenix Ins. Co.* v. *Erie & W. Transp. Co.*, 117 U. S. 312, 321-22 (1886); *Wanamaker* v. *Otis Elevator Co.*, 228 N. Y. 192, 201 (1920); *Northern Assur. Co.* v. *Wolk*, 182 Misc. 112, 114 (App. T. 1944), *aff'd*, 269 App. Div. 768 (1st Dep't 1945).

The subrogee is bound by any limitations on its subrogor's rights, whether they arise by operation of law or by reason of acts or omissions of the subrogor. *Phoenix Ins. Co.* v. *Erie & W. Transp. Co., supra; Fayerweather* v. *Phenix Ins. Co.*, 118 N. Y. 324 (1890); *Platt* v. *Richmond, Y. R. & C. R. R.*, 108 N. Y. 358 (1888); *Mercantile Mut. Ins. Co.* v. *Calebs*, 20 N. Y. 173 (1859); *Northwestern Fire & Marine Ins. Co.* v. *Fred T. Ley & Co.*, 238 App. Div. 255 (4th Dep't 1933), *aff'd*, 264 N. Y. 427 (1934); *Jersey Ins. Co.* v. *Parrish*, 33 N. Y. S. 2d 440 (Erie Co. Ct. 1942).

The "rights of . . . subrogees can rise no higher than their source", *Beecher* v. *Leavenworth State Bank*, 192 F. 2d 10, 14 (9th Cir. 1951), *cert. denied*, 343 U. S. 953 (1952).[5] Consequently, when an insured has released his rights against a third party prior to any payment by the insurer, the insurer cannot thereafter succeed by way of subrogation to the rights the insured previously held. As Professor Vance notes:

[5] *E.g.*, a subrogee is bound by a statute limiting the liability of a third party to the subrogor [*Liberty Mut. Ins. Co.* v. *Sheila-Lynn, Inc.*, 185 Misc. 689 (App. T. 1945), *aff'd*, 270 App. Div. 835 (1st Dep't, 1946)]; a subrogee is bound by its subrogor's contributory negligence and breach of contract [*Maryland Cas. Co.* v. *Independent Metal Prods. Co.*, 99 F. Supp. 862 (D. Neb. 1951) (alternative holding), *aff'd*, 203 F. 2d 838 (8th Cir. 1953) (contributory negligence); *Potomac Ins. Co.* v. *Stanley*, 281 F. 2d 775 (7th Cir. 1960) (breach of contract); *Casualty Co.* v. *A. L. Swett Elec. Light & Power Co.*, 230 N. Y. 199 (1920)]; a subrogee is bound by a holding that a third party is not obligated to the subrogor [*Sexauer & Lemke* v. *Luke A. Burke & Sons Co.*, 228 N. Y. 341 (1920) (Cardozo, J.); *Wanamaker* v. *Otis Elevator Co., supra*, 228 N. Y. 192].

> "... [A] tort-feasor who in good faith and without any knowledge of any *payment* by the insurer to the insured does settle with the insured, may set up this fact as a bar to the insurer's action for subrogation." *Vance, Insurance* 794 (3d ed. 1951)

2. Petitioners have failed to show any conflict with the substantive law of New York. They completely misconceive the nature of the right of subrogation and ignore the distinction between cases involving knowledge on the part of the tortfeasor that an insurer has made payment under the policy and cases where the insurer has refused to make payment. This is demonstrated by *Krause* v. *American Guar. & Liab. Ins. Co.*, 22 N. Y. 2d 147 (1968), on which petitioners rely (petition, pp. 12-13). In that case, which also arose out of the Allied-DeAngelis fraud, the New York Court of Appeals allowed impleader prior to payment by the insurer, thus bringing the New York procedural law in line with Federal practice, but specifically noted that such impleader would *not* deprive the insured of the power to settle with and release the impleaded party. The court said:

> "The insured is free to press on with its claim or, if no payment has been made by the insurer, settle as the insured desires." (22 N. Y. 2d at 154)

Impleader of a third party by an insurer does no more than put that party on notice of the existence of insurance and the insurer's intention to assert its potential subrogation rights if it is compelled to make payment to its insured. But such knowledge does not prevent an insured from giving a valid release to a third party which extinguishes all potential subrogation rights. *Seligson* v. *Fidelity & Cas. Co.* v. *American Express Co.*, N. Y. L. J., Dec. 2, 1966, p. 16, col. 3; Apr. 5, 1967, p. 18, col. 1; June 26, 1967, p. 15, col.

6; July 18, 1968, p. 2, col. 4 (Sup. Ct. N. Y. Co.)[6] See *Ocean Acc. & Guar. Corp.* v. *Hooker Electrochemical Co.*, 240 N. Y. 37, 47-48 (1925); *Pacific Fire Ins. Co.* v. *L.A.D. Motors Corp.*, 136 Misc. 594 (City Ct. N. Y. 1930).

Petitioners' reliance on a dictum in *Silinsky* v. *State-Wide Ins. Co.*, 30 App. Div. 2d 1 (2d Dep't 1968), is misplaced. That dictum is not supported by the cases cited by the Appellate Division which all involved situations where the tortfeasor knew prior to settlement that the insurer had made *actual payment*. Furthermore the dictum is in direct conflict with the earlier decisions of New York's highest court cited at pages 5-6, *supra*, and the *subsequent* decision by that court in *Krause* v. *American Guar. & Liab. Ins. Co.*, *supra*, where as noted the court specifically stated that despite impleader by the insurer—and thus knowledge on the part of the releasee of the existence of insurance—the insured remained free to "settle as the insured desires". (See p. 7, *supra*)

Were the law otherwise, an alleged tortfeasor would remain exposed to further claims with respect to the same subject matter by subrogees of the injured party and would hardly be likely to make a substantial settlement. The insured would thus be deprived of an opportunity to promptly recoup at least part of his losses. This cannot be the law, nor is it.[7]

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[6] These New York decisions by two different justices of the New York Supreme Court also involved the Allied-DeAngelis fraud and rejected contentions of an insurer that it was not bound by the settlement agreement between its insured and Amexco.

[7] Indeed, the law so strongly protects a third party who settles with an insured that, even where the insurer's subrogation rights have vested by payment to the insured, the third party, who thereafter settles in good faith without knowledge of the fact or reason to suspect that the insurer has made payment, is protected from suit by the insurer. *Ocean Acc. & Guar. Corp.* v. *Hooker Electrochemical Co.*, *supra*, 240 N. Y. at 47.

Petitioners also rely upon *Connecticut Fire Ins. Co.* v. *Erie Ry.*, 73 N. Y. 399 (1878) to show a conflict with the substantive law of New York. That case however, does not support their argument. It involved a settlement by an insured and a release which *specifically preserved* the insured's rights against his insurer. The court held that this clause in the release "was in the nature of a proviso or exception from the general purview of the release" (73 N. Y. at 404) and that all that was intended to be settled was the wrongdoer's liability to the insured *in excess* of the insured's coverage. By contrast, the case at bar involves a general and unqualified release and it is undisputed that the release was intended to extinguish all of Bunge's claims against Amexco. In fact, the settlement agreement provided an option to an acceptor to except from the release rights which an insurer might derive by way of subrogation upon payment. Bunge did not exercise that option. The findings of the District Court on this point, which were affirmed by the Court of Appeals, are not challenged (206a-208a, pp. 14a-16a of appendix to petition).

The precise issue here involved, on identical facts, was decided by the New York Supreme Court on September 30, 1968, in *Scarburgh Company, Inc.* v. *Employers' Surplus Lines Insurance Company and American Manufacturers Mutual Insurance Company* v. *American Express Company*, N. Y. L. J., Oct. 4, 1968, p. 17, col. 3. In that action another acceptor of the Amexco settlement had brought an action against its insurance carriers which, in turn, had impleaded Amexco. The court pointed out that Scarburgh accepted the settlement without exercising the option to preserve any potential rights of its insurers against Amexco and that Scarburgh's intent to give a complete release to Amexco extinguishing such rights was clear. The court

obviously found the rationale and decision of the Court of Appeals for the Second Circuit in the case at bar entirely in accord with the substantive law of New York, quoted from it with approval, and said:

> "When an insurance company repudiates liability, it breaches its contract of insurance and thereby frees the insured to press on with its claim. If no payment has been made by its insurer, the assured may settle with the third party as it desires (Matter of Vanguard Ins. Co., 18 N. Y. 2d 376).
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> * * *
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> "By refusing to make payment upon a contract of indemnity the insurer has not perfected its right of subrogation. Subrogation is not perfected until *after* payment, whereupon the insurer succeeds to whatever rights then had by its insured (Comm. Fire Ins. Co. v. Erie Railway Co., 73 N. Y. 399). (Emphasis in original)
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> * * *
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> "Because the third-party complaints against Amexco by each of the insurance companies are predicated upon claims of subrogation the motions made by Amexco for summary judgment dismissing the third-party complaints are granted for the reason that the court finds that the rights to subrogation have been extinguished by the release provision between Scarburgh and Amexco."

3. Petitioners have failed to show any conflict with decisions of the Second or other Circuits. They argue that because they were allowed to implead Amexco under Rule 14(a) of the Rules of Civil Procedure, Bunge could not give Amexco a full release because it could not destroy potential

subrogation rights. There is no merit to this contention. While Rule 14(a) may accelerate the time when a potential right may be asserted for procedural purposes, it is well settled that it does not in any way affect substantive rights or create a substantive right where none exists. 28 U. S. C. § 2072 clearly provides that the rules of civil procedure "shall not abridge, enlarge or modify any substantive right." *United States* v. *Sherwood,* 312 U. S. 584, 590 (1941); *Travelers Ins. Co.* v. *Busy Elec. Co.,* 294 F. 2d 139, 146 (5th Cir. 1961); *Smith* v. *Whitmore,* 270 F. 2d 741, 745 (3d Cir. 1959); *Behar* v. *Savard,* 21 F. R. D. 367, 369 (S. D. N. Y. 1958); 3 *Moore, Federal Practice* ¶ 14.03, p. 491 (2d ed.). Impleader therefore cannot deprive the sole owner of a claim of the power to release it.

Petitioners rely on *Glens Falls Ind. Co.* v. *Atlantic Building Corp.,* 199 F. 2d 60 (4th Cir. 1952), and *St. Paul Fire & Marine Ins. Co.* v. *United States Lines Co.,* 258 F. 2d 374 (2d Cir. 1958), *cert. denied,* 359 U. S. 910 (1959) in support of their claim of conflict between Circuit Court decisions. All that these cases hold is that prior to payment an insurer may implead an alleged tortfeasor. They do not suggest in any way that impleader of a third party prevents an insured from completely releasing that third party. In *Meredith* v. *The Ionian Trader, supra,* 279 F. 2d at 475, the Second Circuit specifically pointed out that its prior decision in *St. Paul* did not mean that substantive rights of subrogation had been changed by the impleader rule.

In sum, petitioners have failed to show any conflict between Circuits or with the substantive law of New York and it is clear that none exists. The decision below is in accord with the fundamental principle of law that until an insurer makes payment, its insured remains the sole owner of any claim against a third party and has the right to release that claim and thereby extinguish potential subrogation rights.

CONCLUSION

FOR THE FOREGOING REASONS, IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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